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No. 88-1553

In The

Supreme Court of the United States

October Term, 1988

JAMES G. RICKETTS, Director, Arizona Department of Corrections, and DONALD WAWRZASZEK, Superintendent of the Arizona State Prison,

Petitioners,

vs.

JOHN HARVEY ADAMSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
Attorney General of
the State of Arizona

JESSICA GIFFORD FUNKHOUSER
Chief Counsel
Criminal Division

JACK ROBERTS
(Counsel of Record)
Assistant Attorney General
Department of Law
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602) 542-4686
(State Bar No. 005149)

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

MEMORANDUM

I.

Respondent agrees that issues I(a) and (b) and III are deserving of review by this Court.

II.

Predictably respondent attempts to bolster the Ninth Circuit's erroneous analysis of Arizona's "especially heinous, cruel, or depraved" circumstance by classifying it as "strikingly similar" to that of Oklahoma discussed in *Maynard v. Cartwright*, 486 U.S. ___, 108 S. Ct. 1853 (1988). There are five good reasons why this Court should grant certiorari.

In the first place, unlike Oklahoma, the trial judge, not the jurors, sentences in Arizona. One of the major concerns of this Court in *Maynard* was that the Oklahoma trial court simply uttered the words of the circumstance, giving no guidance to the jurors about what those words were supposed to mean. Dramatically juxtaposed to the Oklahoma criminal court of appeals' apparently standardless examination of the circumstances to see whether that particular factor should apply, the Arizona Supreme Court has evolved and consistently applied this circumstance.

Second, the four dissenters in this case are the best proof that reasonable minds can differ about whether the Arizona Supreme Court has achieved a constitutionally acceptable limitation. They examined and analyzed the same cases as the seven judges in the majority, but reached exactly the opposite conclusion. (Appendix to the

Petition at 105-16.) It is significant that there were *no dissenters* among the nine judges of the Tenth Circuit who decided *Cartwright v. Maynard*, 822 F.2d 1477 (10th Cir. 1987) (en banc). This acquires even more significance when this Court recalls that it adopted the dissenting view about double jeopardy in its previous review of this case in *Ricketts v. Adamson*, 483 U.S. 1, 107 S. Ct. 2680 (1987).

Third, an earlier panel decision of the Ninth Circuit in *Chaney v. Lewis*, 801 F.2d 1191 (9th Cir. 1987), came to exactly the same conclusion as the four dissenters in the limited en banc court – that the Arizona Supreme Court had acceptably narrowed and applied this particular aggravating factor. The majority opinion dismissed *Chaney* because it was a panel decision that cited only five Arizona Supreme Court decisions. (Appendix to the Petition at 63-64.) That failed to take into account, however, that one of those decisions, *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1, *cert. denied*, 461 U.S. 971 (1983), discussed virtually *every* case involving this aggravating circumstance that had come before the Arizona Supreme Court prior to 1983. The majority realized the comprehensive review undertaken in *Gretzler*. (*Id.* 49-57.) Thus, petitioners respectfully suggest that the majority dismissal of the *Chaney* panel's contrary conclusion, the same conclusion reached by the four dissenters, is a persuasive reason for granting review. There are seven judges on the Ninth Circuit who have held that Arizona has constitutionally construed and applied this circumstance, and seven who think not. That is far different from the unanimous condemnation of the Oklahoma circumstance by the Tenth Circuit en banc in *Cartwright v. Maynard*.

Fourth, the vast majority of states that have a death penalty have a circumstance with virtually identical, or very similar, language. This Court now has before it the amicus brief of Idaho and ten other states that urges this Court to grant review on this issue, as well as the other four. This kind of aggravating circumstance, containing a somewhat more subjective element than other aggravating circumstances, is of serious concern to those states that have a similar circumstance.

Fifth, petitioners believe that the Ninth Circuit's opinion conflicts with that of the Eleventh Circuit in *Ford v. Strickland*, 696 F.2d 804, 819 (11th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 865 (1983). Ford claimed that the Florida Supreme Court violated the Eighth Amendment by failing to apply in his case the same standard of review applied in other cases. Specifically he argued that under Florida case law the court should have set aside two aggravating circumstances, collapsed two more into one and found the existence of one statutory mitigating circumstance and of nonstatutory mitigating circumstances. *Id.* at 819. Rejecting this claim, the Eleventh Circuit said:

> While petitioner characterizes this contention as the Florida Supreme Court's failure to apply consistent standard of review in violation of *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), the district court correctly discerned that he is simply "quarrelling" with the state court. Where in a capital punishment case the state courts have acted through a properly drawn statute with appropriate standards to guide discretion, *Proffitt v. Florida*, 428 U.S. at 258-59, 96 S. Ct. at 2969, federal courts will not undertake a case-by-case comparison of the facts in a given case with the decisions of the state supreme

> court. *Spienkellink v. Wainwright*, 578 F.2d 582, 604-05 (5th Cir. 1978), *cert. denied*, 440 U.S. 976, 99 S. Ct. 1548, 59 L. Ed. 2d 796 (1979). This rule stands even though were we to retry the aggravating and mitigating circumstances in these cases, "we may at times reach results different from those reached in the Florida state courts." *Id.* at 605.

696 F.2d at 819. Petitioners believe that, in large part, the Ninth Circuit is simply "quarrelling" with the state's interpretation of its statute and its application.

One final consideration is extremely important. To petitioners' knowledge, this Court has required only that those criteria used to determine death eligibility acceptably minimize the risk that the penalty may be capriciously imposed. No case from this Court has said that the risk must be totally eliminated or the death penalty will not be permitted. This Court should examine this circumstance to give guidance about whether there is any degree of flexibility in applying this kind of circumstance, and, if so, what that flexibility is. This Court has never said that the criteria for this kind of circumstance must be set in concrete with absolutely no room for evolution in order to be constitutional.

III.

Respondent urges this Court not to grant review on the issue of alleged prosecutorial vindictiveness because it supposedly presents no "novel question" and its facts are so unique that it may not recur. When petitioners stated in the petition for certiorari that the issue was "peculiar to Adamson's case," we meant that it was extremely peculiar, and without legal precedent, that a

federal court of appeals should set aside the state's bargained-for right to prosecute a defendant if the defendant breached the plea agreement, all of which was agreed to by Adamson, and to compel the prosecution to explain to the satisfaction of the federal court why it enforced the right to prosecute after the breach. That is the "peculiar" aspect of this case. As the amicus brief of Idaho and ten other states demonstrates, those states are keenly aware that this is extremely dangerous precedent. The amicus brief points out that prosecutors are not likely to take the chance of entering into a plea agreement that protects the defendant's rights and allows him to unilaterally breach the contract without penalty, but holds the prosecution to the burden of an evidentiary hearing if it attempts to enforce the agreement under the bargained-for right the defendant gave it.

It is clear from the Ninth Circuit opinion that that court would have preferred, after the Arizona Supreme Court declared Adamson in breach, that the prosecution give Adamson the same plea agreement he had just breached, with the same sentence, and proceed to retrial against Dunlap and Robison. Because the state did not do that, a majority of the Ninth Circuit utilized the vehicle of "presumption of vindictiveness" to require an evidentiary hearing. That presumption is based on nothing more than the Ninth Circuit's disagreement with the prosecution's enforcement of the plea agreement against Adamson.

This Court said in *Ricketts v. Adamson*, 483 U.S. 1, 107 S. Ct. 2680 (1987), that Adamson waived his double jeopardy rights if he breached the plea agreement. That meant nothing to the Ninth Circuit, which conceded that the

state might have had the power to prosecute Adamson, but not the right. The plea agreement, however, gave the state the *right* to prosecute Adamson. The Ninth Circuit entirely lost sight of the fact that prosecution on the greater charge would never have been possible if Adamson had not breached the agreement and triggered the enforcement clause. This Court should accept this issue for review to make it clear that an inescapable corollary of its earlier double jeopardy ruling is that Adamson also waved any right to allege prosecutorial vindictiveness when he agreed to allow the state to prosecute him on the greater charge if he breached the agreement. It is clear that nothing in an evidentiary hearing would ever satisfy the Ninth Circuit because a majority of that court, substituting its judgment for that of the prosecutor, is of the unalterable opinion that the state should have negotiated a new agreement with Adamson and proceeded to retrial against Dunlap and Robison. That has nothing to do with enforcement of the plea agreement, but the Ninth Circuit has intertwined the two to require an evidentiary hearing.

This Court said that double jeopardy did not prevent the prosecution of John Harvey Adamson. If it did not, then a federal court's disagreement with the prosecution's enforcement of that agreement is not a legal basis for invoking a presumption of vindictiveness. Petitioners respectfully urge this Court to accept review of this issue so that prosecutors throughout this nation will know that when the defendant breaches the agreement, they may safely proceed to enforce it without a federal appellate court, years down the road, disagreeing with the enforcement and requiring an evidentiary hearing. The State of

Arizona also has the right to fair treatment under the federal constitution and it has not received it from the Ninth Circuit.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General
State of Arizona

JESSICA GIFFORD FUNKHOUSER
Chief Counsel
Criminal Division

JACK ROBERTS
(Counsel of Record)
Assistant Attorney General
Criminal Division
Department of Law
1275 W. Washington, 1st Floor
Phoenix, Arizona 85007
Telephone: (602) 542-4686

Attorneys for Petitioners

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